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October 19, 2004

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338

Dear Ms. Dortch:

Enclosed for filing in this matter are the original and four copies of the reply comments of SBC Communications Inc. ("SBC"). These reply comments consist of a principal brief, as well as four attachments. Both the brief and the attachments contain confidential information that, in accordance with the protective order governing this proceeding, is redacted from SBC's public filing. A single copy of that confidential material is enclosed with this filing.

Consistent with the Commission's NPRM, SBC is providing courtesy copies of this filing, including the confidential material, to the attention of Janice Myles, Wireline Competition Bureau. We are also submitting a paper copy of the redacted version of this filing to Best Copy and Printing, Inc.

All inquiries relating to access (subject to the terms of the applicable protective order) to any confidential information submitted by SBC in this proceeding should be directed to:

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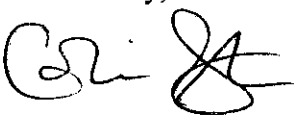
Yours truly,



Colin S. Stretch

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

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October 19, 2004

REDACTED – FOR PUBLIC INSPECTION
Pursuant to Protective Order in CC Docket No. 01-338 & WC Docket No. 04-313
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A: Reply Declaration of Parley C. Casto (Special Access)

B: Joint Declaration of Scott J. Alexander and Rebecca L. Sparks (State Commission Records)

C: Maps Depicting Competition In Wire Centers Affected by Proposed DS1 Carve-Outs

D: Declaration of James E. Keown (Economics of Fiber Deployment)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
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INTRODUCTION AND SUMMARY

The core objective in this proceeding – the task the Commission must accomplish above all else – is to develop unbundling rules that will withstand judicial review. As the Commission is all too aware, in the last eight years, it has tried and failed three times to accomplish that goal. The seemingly endless litigation that has resulted has cast a shadow over the industry, creating substantial uncertainty over the rules of the game and diminishing investment by ILECs and CLECs alike. The Commission has properly pledged that its "primary goal" in this proceeding "is to advance the development of facilities-based competition."[1] That will not happen – indeed, it cannot happen – until the Commission puts in place rules that can survive judicial review.

SBC's opening comments provided a roadmap to fulfill this mandate. SBC first identified the key principles – set out in the text of the 1996 Act itself, and elaborated on in the binding decisions of the Supreme Court and the D.C. Circuit – to which the Commission must adhere in order to survive judicial review. In particular, SBC explained that a proper impairment analysis must restrict unbundling to circumstances in which the Commission makes an

[1] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements*, WC Docket No. 04-313 & CC Docket No. 01-338, FCC 04-179, ¶ 2 (rel. Aug. 20, 2004) ("*Interim Order and NPRM*").

affirmative finding that neither intramodal nor intermodal competitors can compete without UNE access to discrete ILEC facilities. SBC also identified the corollaries to that principle: that unbundling cannot be permitted in competitive markets; that the Commission must draw inferences from where CLECs are competing without UNE access to determine where they *can* compete without such access; and that, even where the Commission finds impairment, it must consider targeted remedies before ordering the drastic remedy of unbundling. Then, applying that overarching principle and its corollaries, SBC explained that, for the key elements affected by the D.C. Circuit's opinion – mass-market switching and high-capacity loops and transport (including dark fiber) – the Commission cannot find impairment. Accordingly, it is duty-bound to conclude that CLECs are not entitled to unbundled access to those facilities. As SBC demonstrated, competitors have *already* proven that they can compete without UNE access to those facilities. It follows that unbundling those facilities would serve only to distort competition in a manner antithetical to the 1996 Act.

SBC could have concluded its comments there. Simply put, in view of the binding principles laid out by the Supreme Court and the D.C. Circuit – and in light of the extensive evidence that CLECs can and do compete without UNE access to ILEC facilities – there can be no serious dispute that a Commission decision denying unbundled access to the facilities identified above would survive judicial review.

SBC did not, however, stop there. Rather, in the interests of compromise, and with the goal of putting an end to the litigation that has plagued the industry, SBC provided a reasonable proposal that would permit CLECs to obtain unbundled access to DS1 loops and transport in the vast majority of SBC wire centers, while restricting such access only in wire centers with highly concentrated demand. As the maps appended to these reply comments demonstrate in vivid

detail, SBC's proposed DS1 loop and transport carve-outs correlate to an extremely high degree with CLEC competitive activity, be it through reliance on competitive fiber, special access, or a combination of both. These maps thus confirm that SBC's proposed carve-outs would limit DS1 loop and transport unbundling only in the wire centers in which CLECs have *already* overwhelmingly established their ability to compete without UNE access to ILEC facilities.

The CLECs, by contrast, have taken a very different tack. Rather than seek common ground, they have once again asked for the moon, just as SBC predicted they would. They insist, again, that CLECs are impaired without access to virtually *all* high-capacity loops and transport in *every* conceivable market. They ask, yet again, that the Commission unbundle mass-market switching, and thereby perpetuate the UNE-P, and in so doing they recycle the same discredited arguments about the supposed irrelevance of intermodal competition and ILECs' purported inability to perform hot cuts. And they even insist that the Commission should *reverse* its judicially affirmed decisions to restrict unbundling of broadband facilities, so as to *broaden* unbundling even beyond that which was ordered in the ill-fated *Triennial Review Order*.[2]

In these reply comments, SBC explains in detail that the CLECs' renewed calls for maximum unbundling are just as unlawful today as they were when they made them, and the courts rejected them, previously. We first address the issue of high-capacity loops and transport, explaining that the CLEC claims of widespread impairment cannot be squared with the evidence in the record. Competitors have deployed hundreds of thousands of route miles of fiber – including an average of 19 fiber networks in each of the top 50 MSAs – and, contrary to the

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied, NARUC v. United States Telecom Ass'n*, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

CLECs' conclusory assertions, they are continuing to extend their networks at an aggressive pace. As the D.C. Circuit observed in *USTA I* – at a time when competitive deployment, though impressive, was far less advanced than it is today – the Commission cannot make "a finding of material impairment" where, as here, "the element in question . . . is significantly deployed on a competitive basis."[3] And that is so even before the Commission takes into account special access, which CLECs are indisputably relying upon to compete and which, as the D.C. Circuit made unequivocally clear in *USTA II*, must be considered in any defensible impairment inquiry.[4]

CLECs, moreover, are not merely running fiber up and down the streets of virtually every major metropolitan area (and a number of smaller ones as well). They are *using* that fiber to provide end-to-end service to medium and large business customers. Already, they have lit tens of thousands of buildings, and the number is growing every day.[5] That should come as no surprise. The reason CLECs have deployed multiple fiber networks in the top MSAs is so that they *can* reach the heavy concentration of business customers that reside in those areas. In this regard, the CLECs' claim that they can extend their fiber to a new building only in the rarest of circumstances – *i.e.*, when there is committed demand for at least three DS3s of capacity in that building – lacks credibility and defies common sense. Simply put, the CLECs would not be ringing cities with thousands of route miles of local fiber if that fiber were of such limited utility.

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[3] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*") *cert. denied*, 538 U.S. 940 (2003).

[4] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 576-77 (D.C. Cir.) ("*USTA II*"), *cert. denied, NARUC v. United States Telecom Ass'n*, Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004); *see also* Casto Reply Decl. ¶ 9 (Attach. A hereto).

[5] *See* UNE Fact Report 2004 at III-3-4, III-31, WC Docket No. 04-313 & CC Docket No. 01-338 (FCC Filed Oct. 4, 2004) ("Fact Report").

But the Commission need not take SBC's word for it. The core of the CLECs' claims – that CLECs deploy fiber only where there is committed demand for multiple DS3s, and that once fiber is in the ground it is available only to the carrier that deployed it – has been refuted, not only by ILEC data and evidence complied by independent third parties, but also *by the CLECs themselves*, in their discovery responses in the state *Triennial Review* proceedings. The loudest champion of these claims, AT&T, admitted in the state proceedings that it deploys loops at the 1 or 2 DS3 level *** ***.[6] Other carriers – including many of the same carriers that are claiming widespread impairment here – likewise admitted that they can and do deploy fiber, not only at the single DS3 level, but also at the DS1 level. Indeed, nearly half of one major CLEC's loops in California were DS1 loops, and, in Texas, three different carriers stated that their *entire portfolio* consists of DS1-level loops.[7] Equally important, in direct contrast to their self-serving misstatements to this Commission, virtually all carriers admitted in the state proceedings that they can and do make wholesale transmission available to other carriers, thus confirming that, once fiber is in the ground, it is available for use by multiple carriers, not just the carrier that deployed it.[8] Finally, the CLECs have no tenable response to the fact that they are today using literally hundreds of thousands of special access circuits to provide services to their customers. Their chief responses – claims of rising special access prices and supposed "lock-up" requirements – are demonstrably false, and their purported concerns about a price squeeze are belied by undisputed evidence and basic economics. (Part I, *infra*.)

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[6] *See* Alexander/Sparks Decl. ¶ 21 (Attach. B hereto).

[7] *See id.*

[8] *See id.* ¶¶ 25-30, 50-54.

The CLECs' renewed attempts to obtain access to mass-market switching and the UNE-P are even less credible. Indeed, perhaps the best evidence of the frailty of these claims is that AT&T itself – formerly the most ardent of the "UNE-P forever" CLECs – has not only disclaimed any contention that mass-market switching can or should be unbundled, but also has specifically contrasted UNE-P competition with the facilities-based competition the Commission has pledged to promote. In all events, the CLECs' calls for reinstating the UNE-P, like their contentions with respect to high-capacity loops and transport, run headlong into the undeniable evidence of competition in the mass market. CLECs are serving fully three million mass-market lines through UNE-L, and a wave of intermodal competitors are fiercely competing for consumers' business. In the face of this evidence, the CLECs' shopworn arguments about purported barriers to entry cannot be taken seriously. (Part II, *infra.*)

Equally implausible are Covad's efforts, along with those of a handful of other commenters, to undo the Commission's judicially affirmed decision to limit unbundling of broadband facilities and the high-frequency portion of the loop. Just last week, the Commission *reaffirmed and extended* its determinations in the *Triennial Review Order* to limit unbundling of broadband facilities. In connection with – indeed, in reliance upon – that much-heralded decision, SBC announced that it would accelerate its plans to push fiber deep into the neighborhoods of *18 million households.* Chairman Powell's observation in that order – that the determinations reached in the *Triennial Review Order* had yielded a spate of new fiber deployment initiatives that would redound to the benefit of consumers for years to come – is thus clearly correct. Yet Covad would have the Commission turn its back on those decisions, reinstate unbundling rules the D.C. Circuit vacated in *USTA I*, and thoroughly undermine confidence in the Commission's willingness to adhere to pro-competitive decisions designed to

encourage investment. Even assuming the Commission has the discretion to reverse its prior determinations – which, in light of the evidence in the record and basic principles of administrative law, it does not – to do so would work a tremendous disservice on the carriers that have begun to roll out new facilities in reliance on the Commission's holdings, and on the consumers that are anticipating the benefits those new facilities will bring. (Part III, *infra*.)

Finally, to ensure that the Commission's determinations here bring much-needed certainty and stability to the industry, the Commission must prevent states from countermanding those determinations, while at the same time ensuring prompt implementation of the new rules and fostering a climate conducive to commercial negotiations. In addition, the Commission must reject the CLECs' pleas for a "multiyear" transition plan away from network elements that the Commission determines need not be unbundled. CLECs have made no credible showing that that they are unable to effect a prompt transition away from UNEs, particularly given the myriad of options available to them for doing so, including use of their own facilities, commercial agreements, resale, and/or SBC's or some other provider's special access services. At a minimum, the Commission must prevent CLECs from using de-listed network elements to add *new* customers. ILECs have already been required to provide these elements for eight years, without any lawful impairment finding. By the same token, CLECs have known throughout that period that their right to use these elements was subject to substantial legal challenge, and thus cannot reasonably have relied on the continued availability of those elements.

* * *

The federal courts have rendered an unusually harsh indictment of the Commission's unbundling efforts to date. In January 1999, the Supreme Court explained that the Commission's first set of unbundling rules was based on the apparent though incorrect belief that the 1996 Act

required that "whatever requested element can be provided must be provided."[9] In 2002, the D.C. Circuit explained that the Commission's second set of rules was based on its mistaken "belief in the beneficence of the widest unbundling possible" and exhibited a "naked disregard of the competitive context."[10] And, most notably, this past March, the D.C. Circuit vacated substantial portions of the Commission's third set of rules, and in so doing highlighted "the Commission's failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings."[11] The Commission's charge here is to respond in a constructive and comprehensive manner to the binding decisions of the Supreme Court and the D.C. Circuit. The CLECs' calls for reinstatement of broad unbundling rules – in the face of widespread competitive deployment and indisputable evidence that they are competing without UNE access to ILEC facilities – are fatally inconsistent with that objective and would result in yet another rebuke from the court of appeals. The Commission should instead move promptly to adopt legally sustainable rules that give due account to competitors' proven ability to compete without UNE access to ILEC facilities.

[9] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999).

[10] *USTA I*, 290 F.3d at 425, 429.

[11] *USTA II*, 359 F.3d at 595.

DISCUSSION

I. THE COMMISSION MUST SUBSTANTIALLY LIMIT UNBUNDLING OF HIGH-CAPACITY FACILITIES

According to the CLECs – in particular, to the smaller CLECs that profess to have embraced a facilities-based approach to competing in the enterprise market – the Commission's decisions on high-capacity loops and transport will dictate their very survival.[12] Openly hostile to the D.C. Circuit,[13] these CLECs invite the Commission to conclude that CLECs are impaired *everywhere* without access to all but the highest capacities of loops and transport.[14] Anything less, they explain, will have "crippling consequences" for CLECs' ability to compete in the enterprise market.[15]

These overheated claims are nothing short of absurd. For one thing, they ignore the compelling evidence of competitive fiber deployment set out in SBC's opening comments and detailed again below. Equally important, they ignore the fact that CLECs as a whole – not just the large CLECs, but the smaller ones as well – obtain access to SBC's facilities as special access far more often than they do as UNEs. SBC provides CLECs with approximately 400,000 DS1 channel terminations – over three times the number of DS1 UNE loops it leases.[16] Given

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[12] *See, e.g.*, Loop & Transport Coalition at 10-11 (emphasizing the "destructive impact" of a decision not to unbundle high-capacity loops and transport).

[13] *See, e.g., id.* at i, v (describing D.C. Circuit as "activist" and "a hostile court"); Sprint at 33 (describing *USTA II* as "misguided").

[14] *See, e.g.*, Alpheus at 20 (no unbundling of dark fiber transport between wire centers serving at least 40,000 business access lines); McLeod at 27 (Commission could decline to order DS3 transport unbundling in the "largest" wire centers in the top 50 MSAs); AT&T at iii (CLECs should be entitled to high-capacity loops and transport in every wire center in the country, up to 2 DS3s for loops and 12 DS3s for transport).

[15] AT&T at 84; *see* Loop & Transport Coalition at 9; ALTS *et al.* at 2.

[16] *See* Casto Reply Decl. ¶ 9.

those facts, it is simply not credible for the CLECs to argue that they cannot compete using DS1 channel terminations. At the DS3 level, the story is much the same, although self-deployment is higher and use of ILEC facilities lower. Hence, SBC provides approximately *28* DS3 channel terminations for every DS3 UNE loop.[17] Here, again, the question is not whether CLECs will survive, or even whether they will continue to successfully rely upon SBC's high-capacity facilities. They will do both. The question, rather, is simply one of price, which the Supreme Court has already held is no basis for a finding of impairment.[18]

Indeed, there can be no dispute that the CLECs view this proceeding as nothing more than a means for obtaining a massive price break. A coalition of them states that, after *USTA II*, they "attempted to negotiate 'commercial alternatives' with the major ILECs, only to find the ILECs unwilling to offer any meaningful new volume and term special access discount plans."[19] That is simply untrue. Immediately in the wake of *USTA II*, SBC began negotiations with CLECs for commercial replacements of UNEs, including high-capacity loops and transport, and, during the course of those negotiations, SBC has offered CLECs innovative and far-reaching alternatives to those facilities (and others). Indeed, SBC offered, to no fewer than 42 CLECs, *new and deeper* special access discounts than it had ever offered before.[20] For one carrier, SBC proposed an arrangement that would increase the efficiency of its special access purchases at the same time as it introduced steep discounts, such that the carrier could implement its five year business plan at special access rates representing an estimated 9% increase over its overall costs of using high-capacity loops and transport at current UNE prices. That CLEC, however, spurned

[17] *See id.*

[18] *See Iowa Utils. Bd.*, 525 U.S. at 389-90 & n.11.

[19] Loop & Transport Coalition at 48.

[20] *See* Casto Reply Decl. ¶ 61.

SBC's offer and insisted instead on maintaining DS1 TELRIC pricing at current levels for seven years.[21] That experience, moreover, is par for the course. Most CLECs with which SBC has initiated discussions in the wake of *USTA II*, to the extent they have negotiated at all, have been dragging their heels.[22] The reason, of course, is that these CLECs are hoping for a better deal from this Commission. This proceeding isn't about the future of facilities-based competition. It is about whether, and the extent to which, the Commission will permit CLECs to obtain access to ILEC high-capacity facilities, at the rock-bottom TELRIC-based prices imposed by state commissions, despite compelling evidence of competitive deployment and a proven track record of CLEC reliance on special access.

A. The Evidence Shows That CLECs Are Not Impaired Without UNE Access to ILEC High-Capacity Loops and Transport

SBC's opening comments presented a broad array of evidence establishing that efficient carriers are in no sense "precluded" from offering service in the enterprise market without UNE access to high-capacity loops and transport. Competitors have deployed a wealth of fiber – approximately 324,000 route miles in total[23] – that CLECs can and do use to provide service. Moreover, they have deployed no less than 62,000 *local* route miles of fiber, and probably much more.[24] MCI touts the fact that it alone has "11,800 local route miles, which [it] uses to provide

[21] *See id.* ¶¶ 58-59.

[22] *See id.* ¶¶ 59-61.

[23] *See* Fact Report at III-3.

[24] *See id.* ("Although less than a third of all CLECs separately report the total number of *local* route miles they operate, the eight carriers that do have deployed more than 62,000 local route miles of fiber.").

local service to business customers in 38 states and the District of Columbia,"[25] and other carriers make similar boasts.[26] Time Warner proudly claims that the bulk of its revenue is derived from services provided *exclusively* over its own facilities, and, for its part, AT&T – which two years ago provided 20% of its T-1 equivalent services solely over its own network – is now estimated to earn at least a quarter of its high-capacity revenues exclusively through use of its own facilities.[27]

Demand for high-capacity transmission is highly concentrated, moreover, and so is competitive fiber. All but ten of the top 150 MSAs are now served by at least one competitive fiber network, and the top 50 MSAs have an average of *19* competitive networks.[28] More than half the wire centers in SBC's territory with more than 10,000 business lines have at least one fiber-based collocator, and more than one-third have at least two.[29] In addition, wireless last-mile facilities are being used with increasing frequency, as is hybrid fiber-coax, which the cable companies are increasingly relying upon to provide a competitive alternative for small and medium-sized businesses.[30] And, in the rare case where competitive fiber is not available to a CLEC – or, in many cases, even where it is – CLECs have proven themselves willing and able to rely on ILEC special access to provide competitive service to enterprise customers. No less than

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[25] MCI at 32. This is 2,800 route miles more than indicated in the Fact Report. That suggests that the 62,000 local route miles referenced above is significantly understated, even for just the eight CLECs that report their local fiber deployment.

[26] *See, e.g.*, AT&T's Fea/Giovannucci Decl. ¶ 11 ("AT&T's networks now include approximately *** *** fiber route miles"); Loop & Transport Coalition at 6, 15-22 (describing in general terms the extent of Coalition members' fiber deployment).

[27] *See* Fact Report at III-3-4.

[28] *See id.* at III-3.

[29] *See* SBC at 78.

[30] *See* Fact Report at III-19-25.

97% of the DS3 loops that carriers purchase from SBC are provided as special access, not UNEs; in fact, as of June of this year, CLECs had leased a mere 290 DS3 UNE loops from SBC. For DS1 loops, the story is much the same. Of the 511,000 DS1 loops SBC provides to CLECs, almost 400,000 – approximately 77% – are sold as special access.[31] Almost 70,000 of these special access DS1 channel terminations (or loops) have been provided to smaller CLECs, many of whom rely on special access for nearly all their DS1 demand. Indeed, with few exceptions, smaller CLECs rely heavily on special access to satisfy their need for high-capacity facilities. Moreover, more than 90% of SBC's special access offerings are provided to competing carriers, not to end users,[32] and AT&T itself has stressed that approximately 98% of the 40,000 DS1 facilities it leases from ILECs – in order to provide service to *local* customers – are obtained as special access, not as UNEs.[33] It is simply impossible to square these facts with CLEC claims that they require DS1 and DS3 UNE loops to compete.

The evidence in the record makes clear not only that CLECs have an array of non-UNE high-capacity transmission options, but also that they are using these options successfully to compete in the enterprise market. Indeed, for all the CLECs' claims about ILEC "monopolies," they cannot escape the fact that ILECs are actually relatively small players in the enterprise market. SBC, for example, accounts for just over 5% of the market.[34] AT&T, MCI, and Sprint, by contrast, collectively control more than half of the market, and they are the primary service

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[31] *See id.* at III-39.

[32] *See* Casto Decl. ¶ 6 (Attach. D to SBC's opening comments).

[33] *See* AT&T, *Transport UNEs Are a Prerequisite for the Development of Facilities-Based Local Competition* at 10 (Oct. 7, 2002) (attached to Ex Parte Letter from Joan Marsh, AT&T, to Marlene Dortch, FCC, CC Docket Nos. 01-338 *et al.* (Oct. 8, 2002)) ("*AT&T Transport Ex Parte*").

[34] *See* Casto Decl. ¶¶ 12-13.

provider for close to three-quarters of large corporate accounts.[35] They also control approximately three-quarters of the market for packet-switched data services such as ATM and Frame Relay, and they are the leading providers of other specialized high-speed data services provided to business customers, such as IP VPN.[36]

These critical facts are often lost in the debate. While AT&T, MCI, and Sprint would like the Commission to focus only on the local access facilities they use to serve enterprise customers, the fact of the matter is that these facilities are only a part of a larger picture in which the incumbent interexchange carriers have significant overall advantages. Carriers that seek to serve the enterprise market must be able to connect multiple customer locations that are often scattered throughout the country, and they must be able to provide a full range of services, including domestic *and international* long distance, as well as desktop information technology services. They must also have institutional credibility, which can be acquired only by establishing and maintaining a track record of providing reliable and cost-effective service in this market, as well as a national sales force with the necessary training and experience. These are all areas in which the BOCs are playing catch-up to the established players in the enterprise market.

Indeed, the CLECs themselves have emphasized this very point. AT&T has loudly proclaimed that it "'ha[s] a significant advantage against any of the Bells'" in the enterprise market.[37] As AT&T stressed just last year – *after* the Bell companies had obtained 271 relief in virtually every state – in the enterprise space, the Bell companies "'don't have the assets, the

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[35] *See* Fact Report at III-32-33.

[36] *See id.*

[37] R. Krause, *Bernard Faces New Round of Challenges*, Investor's Bus. Daily, July 21, 2003, at 3 (quoting then-President of AT&T Business Betsy Bernard).

networks, the services. It takes *decades* to build that capability.'"[38] Two years ago, MCI likewise opined that "'the Bell Companies don't present a major threat to [its] business-service group . . . . [They] don't have the products, systems, or sales forces to attack the middle and high-end segments of the business-service market.' "[39] In April of this year, well after 271 relief, MCI reiterated the point, explaining that, "[w]hen . . . going after sales or trying to hold onto current customers" among "large domestic (US) business customers," MCI's "most serious competitor is AT&T," *not* the Bell companies.[40]

The Commission may not ignore these ILEC disadvantages in its impairment analysis for high-capacity facilities, particularly high-capacity loops and EELs. To the contrary, as the Commission itself has elsewhere acknowledged, it must as a matter of law consider CLEC advantages, along with any ostensible disadvantages, when evaluating claims of impairment.[41] When it does so, it must necessarily conclude that, far from being impaired without access to high-capacity loops and EELs, the large interexchange carriers have reigned supreme without them. In these circumstances, offering them an additional advantage – in the form of TELRIC-priced access – will only solidify their hold in this market. Unbundling would accordingly reduce, not increase, competition.

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[38] *Id.* (same) (emphasis added).

[39] *WorldCom Exec Says Bells Don't Pose Major Threat in Business-Service Arena*, TR Daily (May 7, 2002) (quoting Brian Brewer, Chief Marketing Officer of WorldCom, MCI's predecessor-in-interest).

[40] W. Huyard, *MCI Exits Bankruptcy*, Technews.com (Apr. 21, 2004) (transcript of online discussion).

[41] *See USTA I*, 290 F.3d at 423; *see also Triennial Review Order* ¶ 240 (recognizing CLEC advantages in connection with FTTP loop deployment).

Of course, the ILECs' competitors would like to achieve even more success, and they would like to earn more money doing it.[42] And they see widespread availability of ILEC UNEs as a means to that end. Who wouldn't? Widespread UNE availability would allow them to serve any and all new customers without having to endure the difficulty and risk inherent in deploying their own local access facilities. In addition, in those circumstances where CLECs are already providing service using special access, UNEs offer the enticing prospect of increased margins not only for their existing customers, but also for new customers in like circumstances.

The Commission's role here, however, isn't to pad CLEC margins or to give them a risk-free method of serving enterprise customers. Indeed, the Commission already tried that gambit in the mass-market, and all it has to show for it is the suppression of the real, facilities-based competition the Act was designed to foster. Rather, the Commission's role, as AT&T itself is ultimately forced to admit, is to identify the circumstances in which efficient competitors are "precluded" from providing service without TELRIC-priced access to UNEs.[43] In light of the wealth of evidence of competitive facilities, particularly in the densely populated areas of significant demand, coupled with the demonstrated success the Bell companies' competitors have achieved in the enterprise space largely without UNEs, it is simply impossible for the Commission to conclude, as the CLECs' contend, that carriers are "precluded" from entering virtually everywhere without UNEs.

On the contrary, at a bare minimum, the Commission must conclude that CLECs are *not* impaired without access to DS3 and above loops and transport, dark fiber, and entrance facilities.

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[42] *See, e.g.*, Integra at 22 (contending that special access is an inadequate alternative because "the business plan for Integra Telecom and all companies similarly situated was based on TELRIC pricing for unbundled network elements").

[43] *See* AT&T at 10.

And, as to DS1 loops and transport, the Commission must at the very least restrict unbundling in the wire centers identified in SBC's opening comments.[44] Attachment C to these reply comments is a set of maps that display, in vivid detail, the volume of competition in the wire centers covered by SBC's proposed tests.[45] As these maps make clear, SBC's proposals would exclude from unbundling only those wire centers with pronounced, readily measurable demand. Indeed, CLECs are *already* competing extensively in these wire centers, using competitive fiber, ILEC special access, or both. Any suggestion that CLECs are impaired without DS1s in those wire centers in particular simply cannot be squared with reality.

B. The CLECs' Claims of Impairment, to the Limited Extent They Are Supported at All, Rest on Legal and Factual Misstatements

The CLECs contend that they are impaired everywhere. But what is most notable about the comments making this contention is what they do not contain: evidence of actual deployment. It is by now beyond legitimate dispute that the core task for the Commission in this proceeding is to determine the circumstances in which it is feasible for efficient competitors to compete without UNE access to ILEC facilities. It is equally beyond dispute that the best

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[44] *See* SBC at 78-80, 89.

[45] To support SBC's proposed DS1 transport carve-out, these maps identify illustrative wire centers with more than 10,000 business access lines, as well as wire centers with between 5,000 and 10,000 business access lines. The maps then show known CLEC fiber routes and wire centers with known fiber-based collocation. In addition, to support SBC's proposed DS1 loop carve-out, SBC shows illustrative wire centers with more than 15,000 business access lines, along with known CLEC lit buildings and CLEC usage of special access (broken down by capacity) to serve customers.

These maps, like those SBC has previously submitted in this proceeding, are based in part on data assembled by GeoResults. AT&T (at 71-72) contests the validity of these data, on the theory that in certain specific instances they were contradicted by data provided by CLECs in the state proceedings. In view of the CLECs' own failure to provide the Commission meaningful evidence, this criticism can hardly be taken seriously. In any case, the state commission proceedings largely *validated*, not undercut, the reliability of the GeoResults data. *See* Alexander/Sparks Decl. ¶¶ 63-66.

evidence bearing on this inquiry is where CLECs *already* compete without UNE access to ILEC facilities, either with competitively deployed facilities or with special access. Astonishingly, however, the CLECs are utterly silent on this point. Notwithstanding their broad, almost unlimited claims of impairment, they have again refused to provide this Commission with the best evidence available to inform those claims.

The only logical inference to be drawn from this refusal is that the evidence the CLECs *would* provide – if in fact they were forced to produce it – would confirm the evidence that the ILECs have been able to assemble and put on the record, and show that CLECs are *not* impaired without UNE access to ILEC high-capacity loops and transport. Indeed, the Commission *must* draw that inference. As SBC noted in its opening comments, it is well established that, "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him."[46] The reason for that black-letter rule is clear: a party that has relevant evidence in its possession and fails to produce it must be assumed to have something to fear from it, "'and this fear is some evidence that the [evidence], if brought, would have exposed facts unfavorable to the party.'"[47] In these circumstances, the Commission has no choice but to conclude that the actual evidence of competitive deployment – the evidence the CLECs have but refused to produce – directly contradicts their claims that they are impaired without UNE access to high-capacity loops and transport.[48]

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[46] *See, e.g., International Union, United Auto. Workers v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972).

[47] *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (quoting 2 *Wigmore on Evidence* § 285, at 192 (Chadbourn rev. 1979)).

[48] *See id.*; *see also Warshawsky & Co. v. NLRB*, 182 F.3d 948, 955 (D.C. Cir. 1999) (approving the NLRB's "adverse inference against the union for failing to produce evidence about the content of conversations involving union members"); *Streber v. Commissioner*, 138 F.3d 216, 221 (5th Cir. 1998) (court may draw negative inference from party's failure to produce

Apart from the inferences the Commission is legally required to draw from the failure of the CLECs to provide relevant evidence, the so-called evidence the CLECs did see fit to produce is wholly insufficient to support their broad claims of impairment. Indeed, as we will now explain, the CLECs' claims are based in all events on a distorted view of the legal task facing the Commission, on a deeply flawed analysis of the evidence assembled in the state *Triennial Review* proceedings, and on an unexplained and irrational understanding of ILECs' ability to undermine competition in the enterprise market.

1. *USTA II* Mandates Substantial Revision to the Commission's Impairment Analysis for Dedicated Transport and Unbundled Loops

The CLECs' renewed calls for maximum unbundling of high-capacity loops and transport are based, first and foremost, on their position that *USTA II* in no way called into question the Commission's analysis in the *Triennial Review Order*. In their view, the court's vacatur in *USTA II* was based solely on the Commission's decision to delegate unbundling determinations to the states. As they see it, had the Commission not done so – had it, for example, applied the trigger analysis it delegated to the states itself – then the *Triennial Review Order* would have been resoundingly affirmed, not reversed, by the court of appeals.[49]

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witness "'whose testimony would elucidate the transaction'") (quoting *Graves v. United States*, 150 U.S. 118, 121 (1893)); *cf. United States v. Perez*, 299 F.3d 1, 3 (1st Cir. 2002) (noting that, due to "the failure of a party to produce available evidence that would help decide an issue, the jury may infer that the evidence would [have been] unfavorable to the party to whom it is available or whom it would ordinarily be expected to favor") (internal quotation marks omitted; alteration in original); *Labadie Coal Co. v. Black*, 672 F.2d 92, 94-95 (D.C. Cir. 1982) ("[T]the failure to produce the ordinary corporate records would have justified drawing the normal inferences against Black as one who should have been able to produce those documents.").

[49] *See, e.g.*, AT&T at 6 (asserting that the court's vacatur was based "only" on the fact that the Commission *itself* "had not found that there generally was impairment" below the capacity thresholds set out in the *Triennial Review Order*); MCI at 126, 138; Loop & Transport Coalition at 4.

That view rests on an overt misreading of the court's decision. As the D.C. Circuit made clear, the Commission's trigger approach – *regardless* of who applied it – "simply ignore[d] facilities deployment along similar routes."[50] And that, in turn, rendered the approach unlawful.[51] Thus, rather than the trigger analysis the CLECs seek to resurrect here, the court directed the Commission instead to adopt "a sensible definition of the markets in which deployment occurs," thus permitting the Commission to consider "facilities deployment along similar routes when assessing impairment."[52] Furthermore, in undertaking that "sensible" approach, as opposed to the flawed one embodied in the *Triennial Review Order*, the Commission must consider the presence of "competition on one route" when it "assess[es]" impairment on other routes.[53] The inquiry, moreover, is not whether particular routes are *already* fully competitive – as the *Triennial Review Order* purported to assess – but rather whether "competition is possible" without UNEs in a particular market.[54] Finally, the Commission must "consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired."[55] These instructions are simply incompatible with the CLECs' core claim here: that impairment should be judged on specific routes according to whether each specific route is *already* fully competitive.[56]

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[50] *USTA II*, 359 F.3d at 575.

[51] *See id.*; *see also USTA I*, 290 F.3d at 422, 426 (instructing Commission to apply a "nuanced conception of impairment" that would preclude unbundling "where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis").

[52] *USTA II*, 359 F.3d at 574, 575.

[53] *Id.* at 575.

[54] *Id.*

[55] *Id.* at 577.

[56] The suggestion that the D.C. Circuit did not "find anything wrong with" the *Triennial Review Order*'s unbundling of high-capacity loops (*see, e.g.*, AT&T at 2 n.1) is also incorrect.

The CLECs dispute all of this, contending that, delegation matters aside, the court's criticism of the Commission's impairment analysis in connection with high-capacity facilities was limited to two discrete issues: (1) ambiguity over whether the Commission's test applied to "efficient" carriers, and (2) questions surrounding the relevance of universal service considerations.[57] As to the former, they correctly contend that the standard is the "efficient" competitor standard,[58] and, as to the latter, they claim it has no relevance in connection with high-capacity facilities, but instead matters only in connection with the mass market.

In fact, the court's criticism of the *Triennial Review Order* went well beyond these considerations, including, for example, the issues described immediately above, as well as the court's insistence that the Commission "cannot ignore intermodal alternatives." *USTA II*, 359 F.3d at 571-73 (citing *USTA I*, 290 F.3d at 429). Even as to the universal service consideration, moreover, the CLECs are wrong to suggest that its relevance is limited to the mass market and the UNE-P – *i.e.*, to circumstances where competition is suppressed not through any barriers to entry linked to monopoly characteristics that could conceivably form the basis for impairment,

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The court included within its discussion of high-capacity facilities "transmission facilities dedicated to a single customer," which is how the FCC defines a "loop." *USTA II*, 359 F.3d at 573; *see also* 47 C.F.R. § 51.319(a). In addition, the court vacated "those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired," 359 F.3d at 568, a statement that encompasses high-capacity loops, *see Triennial Review Order* ¶¶ 328-342. Finally, the two substantive flaws the court identified with respect to the Commission's analysis of high-capacity facilities – considering impairment on a route-specific basis and the failure to consider the availability of special access, *see* 359 F.3d at 575, 577 – apply equally to the Commission's determinations as to both loops and transport, *see Triennial Review Order* ¶¶ 102, 332, 341, 401, 407.

[57] AT&T at 10-11.

[58] *See id.*; *see also* Loop & Transport Coalition at 27-28; PACE at 33; ALTS *et al.* at 7; ATX *et al.* at 4.

but rather to subsidized retail rates.[59] Although this consideration is certainly relevant in that context, it is also relevant to consideration of competition in the enterprise market. Indeed, as the court explained in *USTA I*, it is there – where ILECs must attempt to "offset their losses in the subsidized markets" – "that the gap in the Commission's reasoning" to date has been the "greatest." 290 F.3d at 422. In conducting an impairment analysis, the Commission must consider not only advantages that ILECs may enjoy, but also any "advantage[s] *CLECs* enjoy," including (in addition to the other advantages, discussed above, that they enjoy in the enterprise space) "being free of any duty to provide underpriced service to rural and/or residential customers and thus of any need to make up the difference elsewhere." *Id.* at 423 (emphasis added).[60]

The CLECs are also incorrect to contend that the D.C. Circuit's precedent in this arena permits the Commission to consider impairment on a CLEC-specific basis, asking not whether competition is possible on a given route, but rather whether individual competitors need (or

[59] *See* AT&T at 11-12.

[60] Relatedly, the CLECs are wrong to resurrect their contention that the "at a minimum" clause permits the Commission to order unbundling absent impairment. *See, e.g., id.* at 25-26. Impairment is the "touchstone" of the unbundling inquiry. *USTA I*, 290 F.3d at 425. As a result, as both the Supreme Court and the Commission itself have made clear, a valid impairment finding is a necessary prerequisite to unbundling. *See Iowa Utils. Bd.*, 525 U.S. at 388-89, 391-92, 397 (finding that the Commission "was wrong" in concluding that impairment inquiry was discretionary); Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, ¶ 16 (2000) ("*Supplemental Order Clarification*") (Commission determines "impairment" "before imposing additional unbundling obligations on incumbent LECs"). Any attempt to expand unbundling in the absence of a finding of impairment – whether for administrative reasons or under the mistaken view that unbundling is an unqualified good – is thus beyond the Commission's statutory authority. Indeed, in *USTA II*, the court made clear that the Commission was within the scope of its authority to *limit* unbundling under the "at a minimum" clause. But it nowhere suggested that this clause permits the Commission to order unbundling absent impairment. *See USTA II*, 359 F.3d at 572 (approving Commission's decision to view impairment "as a continuous rather than as a dichotomous variable," provided it uses the "at a minimum" clause "to examine the full context before ordering unbundling").

want) UNE access to high-capacity facilities. On this view, because impairment is a CLEC-specific inquiry, the fact that one particular CLEC has deployed facilities on a particular route or to a particular location says nothing about whether another CLEC – say, for example, one that has not won as much business yet – is impaired on that same route or to that same location. As AT&T puts it, with respect to loops, "[j]ust because one competitor may find it economically feasible to construct a lateral from its metro fiber to a particular location . . . that does not mean that any other carrier . . . could deploy loops to that same location at the same capacity level."[61] And, with respect to transport, "the existence of one carrier's transport in a wire center does not allow an inference that other carriers could deploy transport even to that wire center, much less in broader geographic markets."[62]

This approach is absurd and, even more to the point, unlawful. Under this analysis, a particular route could be fully competitive – with, say, a *dozen* competitive carriers using competitively deployed fiber running from a particular wire center (or to a particular building). Yet, when the 13th carrier shows up and seeks to provide service on that same route, it would be considered impaired, simply because *that particular carrier* has not (yet) won enough traffic to warrant deployment of its *own* fiber.

Congress plainly did not intend such an outrageous result, and it has been squarely rejected by the D.C. Circuit. In the *Line Sharing Order*,[63] the Commission adopted an approach

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[61] AT&T at 39.

[62] *Id.* at 50. AT&T makes the same claim throughout its comments. *See id.* at 14 ("Whether any particular carrier can deploy its own transmission facilities is thus a function of whether *that individual carrier* has enough traffic *on a given route* to justify" deployment) (emphasis added); *id.* at 17 (impairment inquiry turns on "any particular carrier's ability to deploy its own transmission facilities").

[63] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications*

akin to what the CLECs request here – *i.e.*, a mandate to obtain unbundled access to ILEC facilities based solely on their own needs and wants, without regard to the state of competition in the broadband market. And, in *USTA I*, the D.C. Circuit unequivocally rejected that approach. Chastising the Commission for its "naked disregard of the competitive context," the court stressed that the impairment inquiry must be tied to whether *competition*, not particular competitors, is impaired without access to UNEs.[64] Indeed, the contrary view, the court explained, is "quite unreasonable" and ignores the need for "balance" described in the Supreme Court's *Iowa Utilities Board* decision.[65] Unbundling, the court emphasized, imposes significant social costs, including "the disincentive to invest in innovation" for CLECs and ILECs alike, as well as "complex issues of managing shared facilities."[66] And, critically, "nothing in the Act appears a license to the Commission to inflict on the economy" the costs of unbundling where there is "no reason to think doing so would bring on a significant enhancement of competition."[67]

Yet that is exactly what the CLECs would have this Commission do. Under their approach, impairment would exist on particular routes *not* because there are any characteristics

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Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

[64] *See USTA I*, 290 F.3d at 429.

[65] *Id.* at 427, 429.

[66] *Id.* at 427.

[67] *Id.* at 429. AT&T's reliance (at 14) on paragraph 377 of the *Triennial Review Order* to support its proposed CLEC-centric approach is of no import, given the D.C. Circuit's clear holding. But AT&T, in any event, mischaracterizes the paragraph on which it purports to rely. There, the Commission noted only that impairment for loops and transport may vary depending on the "*capacity* levels" at issue; it said nothing to suggest that AT&T's or any other CLEC's own *individual* needs would dictate impairment. *Triennial Review Order* ¶ 377 (emphasis added).